

50 FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 12.4. Disclosure Statement

1 **(a) Who Must File.**

2 **(1) Nongovernmental Corporate Party.** Any
3 nongovernmental corporate party to a proceeding in
4 a district court must file a statement that:

5 (A) identifies any parent corporation and any
6 publicly held corporation that owns 10% or
7 more of its stock or states that there is no such
8 corporation, and

9 (B) discloses any additional information that may be
10 required by the Judicial Conference of the
11 United States.

12 **(2) Organizational Victim.** If an organization is a
13 victim of the alleged criminal activity, the
14 government must file a statement identifying the
15 victim. If the organizational victim is a corporation,

16 the statement must also disclose the information
 17 required by Rule 12.4(a)(1).

18 **(b) Time for Filing; Supplemental Filing.**

19 **(1) A party must file the Rule 12.4(a) statement upon its**
 20 first appearance, pleading, petition, motion,
 21 response, or other request addressed to the court,
 22 and

23 **(2) must promptly file a supplemental statement upon**
 24 any change in the information that the statement
 25 requires.

COMMITTEE NOTE

Rule 12.4 is a new rule modeled after Federal Rule of Appellate Procedure 26.1 and parallels similar provisions being proposed in new Federal Rule of Civil Procedure 7.1. The purpose of the rule is to assist judges in determining whether they must recuse themselves because of a "financial interest in the subject matter in controversy." Code of Judicial Conduct, Canon 3C(1)(c)(1972). It does not, however, deal with other circumstances that might lead to disqualification for other reasons.

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Under Rule 12.4(a)(1), any nongovernmental corporate party must file a statement that indicates whether it has any parent corporation that owns 10% or more of its stock or indicates that there is no such corporation. In addition, the rule requires that party to disclose any other information that may be required by the Judicial Conference. Although the term "nongovernmental corporate party" will almost always involve organizational defendants, it might also cover any third party that asserts an interest in property to be forfeited under new Rule 32.2.

Rule 12.4(a)(2) requires an attorney for the government to file a statement that lists any organizational victims to the alleged criminal activity; the purpose of this disclosure is to alert the court to the fact that a possible ground for disqualification might exist. Further, if the organizational victim is a corporation, the statement must include the same information required of any nongovernmental corporate party.

Although the disclosures required by Rule 12.4 may seem limited, they are calculated to reach the majority of circumstances that are likely to call for disqualification on the basis of information that a judge may not know or recollect. Framing a rule that calls for more detailed disclosure is problematic and will inevitably require more information than is necessary for purposes of automatic recusal. Unnecessary disclosure of volumes of information may create the risk that a judge will overlook the one bit of information that might require disqualification, and may also create the risk that courts will experience unnecessary disqualifications rather than attempt to unravel a potentially difficult question.

The same concerns about overbreadth are potentially present in any local rules that might address this topic. Rule 12.4 does not

address the promulgation of any local rules that might address the same issue, or supplement the requirements of the rule. However, the authority granted to the Judicial Conference to require additional disclosures provides authority to preempt any local rules on the same topic.

The rule does not cover disclosure of all financial information that could be relevant to a judge's decision whether to recuse himself or herself from a case. The Committee believes that with the various disclosure practices in the federal courts and with the development of technology, more comprehensive disclosure may be desirable and feasible. The Committee further believes that the Judicial Conference is in the best position to develop any additional requirements and to adjust those requirements as technological and other developments warrant. Accordingly, Rule 12.4(a)(1)(B) authorizes the Judicial Conference to promulgate more detailed financial disclosure requirements for criminal cases.

Rule 12.4(b)(1) indicates that the time for filing a disclosure statement is at the point when the parties first have formal contact with the court in a criminal proceeding. In some instances, that might be as early as the initial appearance.

Finally, Rule 12.4(b)(2) requires the parties to file supplemental statements with the court if there are any changes in the information required in the statement.

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1 **~~Rule 26. Taking of Testimony~~**

2 ~~— In all trials the testimony of witnesses shall be taken orally~~
3 ~~in open court, unless otherwise provided by an Act of~~
4 ~~Congress or by these rules, the Federal Rules of Evidence, or~~
5 ~~other rules adopted by the Supreme Court.~~

6 **Rule 26. Taking Testimony**

7 **(a) In General.** In all trials the testimony of witnesses must
8 be taken in open court, unless otherwise provided by an
9 Act of Congress or by rules adopted under 28 U.S.C.
10 §§ 2072-2077.

11 **(b) Transmitting Testimony from Different Location.** In
12 the interest of justice, the court may authorize
13 contemporaneous video presentation in open court of
14 testimony from a witness who is at a different location if:
15 (1) the requesting party establishes compelling
16 circumstances for such transmission;

- 17 (2) appropriate safeguards for the transmission are used;
18 and
19 (3) the witness is unavailable within the meaning of Rule
20 804(a)(4)-(5) of the Federal Rules of Evidence.

COMMITTEE NOTE

The language of Rule 26 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Rule 26(a) is amended, by deleting the word "orally," to accommodate witnesses who are not able to present oral testimony in open court and may need, for example, a sign language interpreter. The change conforms the rule, in that respect, to Federal Rule of Civil Procedure 43.

A substantive change has been made to Rule 26(b). That amendment permits a court to receive the video transmission of an absent witness if certain conditions are met. As currently written, Rule 26 indicates that normally only testimony given in open court will be considered, unless otherwise provided by these rules, an Act of Congress, or any other rule adopted by the Supreme Court. An example of a rule that provides otherwise is Rule 15. That Rule recognizes that depositions may be used to preserve testimony if there are exceptional circumstances in the case and it is in the interest of justice to do so. If the person is "unavailable" under Federal Rule of

Evidence 804(a), then the deposition may be used at trial as substantive evidence. The amendment to Rule 26(b) extends the logic underlying that exception to contemporaneous video testimony of an unavailable witness. The amendment generally parallels a similar provision in Federal Rule of Civil Procedure 43.

The Committee believed that permitting use of video transmission of testimony only in those instances when deposition testimony could be used is a prudent and measured step. The proponent of the testimony must establish that there are compelling circumstances for such transmission. A party against whom a deposition may be introduced at trial will normally have no basis for objecting if contemporaneous testimony is used instead. Indeed, the use of such transmitted testimony is in most regards superior to other means of presenting testimony in the courtroom. The participants in the courtroom can see for themselves the demeanor of the witness and hear any pauses in the testimony, matters that are not normally available in non-video deposition testimony. Although deposition testimony is normally taken with all counsel and parties present with the witness, those are not absolute requirements. *See, e.g., United States v. Salim*, 855 F.2d 944, 947-48 (2d Cir. 1988) (conviction affirmed where deposition testimony used although defendant and her counsel were not permitted in same room with witness, witness's lawyer answered some questions, lawyers were not permitted to question witness directly, and portions of proceedings were not transcribed verbatim).

The Committee recognized that there is a need for the trial court to impose appropriate safeguards and procedures to insure the accuracy and quality of the transmission, the ability of the jurors to hear and view the testimony, and the ability of the judge, counsel, and

the witness to hear and understand each other during questioning. *See, e.g., United States v. Gigante*, 166 F.3d 75 (2d Cir. 1999). Deciding what safeguards are appropriate is left to the sound discretion of the trial court.

The Committee believed that including the requirement of "unavailability" as that term is defined in Federal Rule of Evidence 804(a)(4) and (5) will insure that the defendant's Confrontation Clause rights are not infringed. In deciding whether to permit contemporaneous transmission of the testimony of a government witness, the Supreme Court's decision in *Maryland v. Craig*, 497 U.S. 836 (1990) is instructive. In that case, the prosecution presented the testimony of a child sexual assault victim from another room by one-way closed circuit television. The Court outlined four elements which underlie Confrontation Clause issues: (1) physical presence; (2) the oath; (3) cross-examination; and (4) the opportunity for the trier-of-fact to observe the witness's demeanor. *Id.* at 847. The Court rejected the notion that a defendant's Confrontation Clause rights could be protected only if all four elements were present. The trial court had explicitly concluded that the procedure was necessary to protect the child witness, i.e., the witness was psychologically unavailable to testify in open court. The Supreme Court noted that any harm to the defendant resulting from the transmitted testimony was minimal because the defendant received most of the protections contemplated by the Confrontation Clause, i.e., the witness was under oath, counsel could cross-examine the absent witness, and the jury could observe the demeanor of the witness. *See also United States v. Gigante, supra* (use of remote transmission of unavailable witness's testimony did not violate confrontation clause).

Although the amendment is not limited to instances such as those encountered in *Craig*, it is limited to situations when the witness is unavailable for any of the reasons set out in Federal Rule of Evidence 804(a)(4) and (5). Whether under particular circumstances a proposed transmission will satisfy some, or all, of the four protective factors identified by the Supreme Court in *Craig*, is a decision left to the trial court.

By defining unavailability — for the purposes of this rule — in the context of Federal Rule of Evidence 804(a)(4) and (5), the rule indicates a preference for remote transmission of live testimony as opposed to a deposition. The Committee was aware that Rule 804(a)(5) generally recognizes a preference for deposition testimony where the ground for unavailability in that rule is based upon the witness's absence from the jurisdiction. Under Rule 804(a)(5), a proponent may not rely upon the hearsay exceptions, other than the exception for former testimony in Rule 804(b)(1), unless the proponent first demonstrates that the declarant is absent from the jurisdiction and that the proponent has been unable to obtain the declarant's attendance or testimony. The Committee recognizes that the amendment may have an impact on the operation of Rule 804, for example, in those cases where the declarant's ability to testify by remote transmission may preclude counsel from relying upon Rule 804(a)(5).

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench

and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 26 is one of those rules. This proposed revision of Rule 26 includes an amendment that would authorize a court to receive testimony from a remote location. Another version of Rule 26, which does not include this significant amendment, is being published simultaneously in a separate pamphlet.

1 **Rule 30. Instructions**

2 ~~— At the close of the evidence or at such earlier time during~~
3 ~~the trial as the court reasonably directs, any party may file~~
4 ~~written requests that the court instruct the jury on the law as~~
5 ~~set forth in the requests. At the same time copies of such~~
6 ~~requests shall be furnished to all parties. The court shall inform~~
7 ~~counsel of its proposed action upon the requests prior to their~~
8 ~~arguments to the jury. The court may instruct the jury before~~
9 ~~or after the arguments are completed or at both times. No~~
10 ~~party may assign as error any portion of the charge or~~
11 ~~omission therefrom unless that party objects thereto before the~~
12 ~~jury retires to consider its verdict, stating distinctly the matter~~

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13 ~~to which that party objects and the grounds of the objection.~~

14 ~~Opportunity shall be given to make the objection out of the~~

15 ~~hearing of the jury and, on request of any party, out of the~~

16 ~~presence of the jury.~~

17 **Rule 30. Jury Instructions**

18 **(a) In General.** Any party may request in writing that the

19 court instruct the jury on the law as specified in the

20 request. The request must be made at the close of the

21 evidence or at any earlier time that the court reasonably

22 directs. When the request is made, the requesting party

23 must furnish a copy to every other party.

24 **(b) Ruling on a Request.** The court must inform the parties

25 before closing arguments how it intends to rule on the

26 requested instructions.

- 27 **(c) Time for Giving Instructions.** The court may instruct
 28 the jury before or after the arguments are completed, or
 29 at both times.
- 30 **(d) Objections to Instructions.** A party who objects to any
 31 portion of the instructions or to a failure to give a
 32 requested instruction must inform the court of the specific
 33 objection and the grounds for the objection before the
 34 jury retires to deliberate. An opportunity must be given
 35 to object out of the jury's hearing and, on request, out of
 36 the jury's presence.

COMMITTEE NOTE

The language of Rule 30 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted, below.

Rule 30(a) is amended to reflect a change in the timing of requests for instructions and now mirrors Federal Rule of Civil Procedure 51. As currently written, the trial court may not direct the

parties to file such requests before trial without violating Rules 30 and 57. While the amendment falls short of requiring all requests to be made before trial in all cases, the amendment permits a court to do so in a particular case or as a matter of local practice under local rules promulgated under Rule 57.

Rule 30(d) has been changed to clarify what, if anything, counsel must do to preserve error regarding an instruction or failure to instruct. The rule retains the requirement of a contemporaneous and specific objection (before the jury retires to deliberate). As the Supreme Court recognized in *Jones v. United States*, 119 S. Ct. 2090, 2102 (1999), read literally, current Rule 30 could be construed to bar any appellate review absent a timely objection when in fact a court may conduct a limited review under a plain error standard. The topic of plain error is not addressed in Rule 30 because it is already covered in Rule 52. No change in practice is intended by the amendment.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 30 is one of those rules. This proposed revision of Rule 30 includes an amendment that would authorize a court to require the parties to file requests for instructions before trial. Another version of Rule 30, which does not include this substantive amendment, is being published simultaneously in a separate pamphlet.

1 **Rule 32. Sentence and Judgment**

2 **(a) In General; Time for Sentencing.** ~~When a presentence~~
 3 ~~investigation and report are made under subdivision~~
 4 ~~(b)(1), sentence should be imposed without unnecessary~~
 5 ~~delay following completion of the process prescribed by~~
 6 ~~subdivision (b)(6). The time limits prescribed in~~
 7 ~~subdivision (b)(6) may be either shortened or lengthened~~
 8 ~~for good cause.~~

9 **(b) Presentence Investigation and Report.**

10 ~~— (1) When Made. The probation officer must make a~~
 11 ~~presentence investigation and submit a report to the~~
 12 ~~court before the sentence is imposed unless:~~
 13 ~~— (A) the court finds that the information in the record~~
 14 ~~enables it to exercise its sentencing authority~~
 15 ~~meaningfully under 18 U.S.C. § 3553; and~~

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16 ~~—— (B) the court explains this finding on the record.~~

17 ~~Notwithstanding the preceding sentence, a~~
18 ~~presentence investigation and report, or other~~
19 ~~report containing information sufficient for the~~
20 ~~court to enter an order of restitution, as the~~
21 ~~court may direct, shall be required in any case in~~
22 ~~which restitution is required to be ordered.~~

23 ~~—— (2) **Presence of Counsel.** On request, the defendant's~~
24 ~~counsel is entitled to notice and a reasonable~~
25 ~~opportunity to attend any interview of the defendant~~
26 ~~by a probation officer in the course of a presentence~~
27 ~~investigation.~~

28 ~~—— (3) **Nondisclosure.** The report must not be submitted to~~
29 ~~the court or its contents disclosed to anyone unless~~
30 ~~the defendant has consented in writing, has pleaded~~
31 ~~guilty or nolo contendere, or has been found guilty.~~

32 ~~— (4) Contents of the Presentence Report. The~~
33 ~~presentence report must contain —~~

34 ~~— (A) information about the defendant's history and~~
35 ~~characteristics, including any prior criminal~~
36 ~~record, financial condition, and any~~
37 ~~circumstances that, because they affect the~~
38 ~~defendant's behavior, may be helpful in~~
39 ~~imposing sentence or in correctional treatment;~~

40 ~~— (B) the classification of the offense and of the~~
41 ~~defendant under the categories established by~~
42 ~~the Sentencing Commission under 28 U.S.C.~~
43 ~~§ 994(a), as the probation officer believes to be~~
44 ~~applicable to the defendant's case; the kinds of~~
45 ~~sentence and the sentencing range suggested for~~
46 ~~such a category of offense committed by such a~~
47 ~~category of defendant as set forth in the~~

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48 guidelines issued by the Sentencing Commission
49 under 28 U.S.C. § 994(a)(1); and the probation
50 officer's explanation of any factors that may
51 suggest a different sentence — within or without
52 the applicable guideline — that would be more
53 appropriate, given all the circumstances;
54 ~~—— (C) a reference to any pertinent policy statement~~
55 issued by the Sentencing Commission under 28
56 U.S.C. § 994(a)(2);
57 ~~—— (D) verified information, stated in a~~
58 nonargumentative style, containing an
59 assessment of the financial, social,
60 psychological, and medical impact on any
61 individual against whom the offense has been
62 committed;

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- 63 ~~—— (E) in appropriate cases, information about the~~
64 ~~nature and extent of nonprison programs and~~
65 ~~resources available for the defendant;~~
66 ~~—— (F) in appropriate cases, information sufficient for~~
67 ~~the court to enter an order of restitution;~~
68 ~~—— (G) any report and recommendation resulting from~~
69 ~~a study ordered by the court under 18 U.S.C.~~
70 ~~§ 3552(b); and~~
71 ~~—— (H) any other information required by the court.~~
72 ~~—— (5) Exclusions. The presentence report must exclude:~~
73 ~~—— (A) any diagnostic opinions that, if disclosed, might~~
74 ~~seriously disrupt a program of rehabilitation;~~
75 ~~—— (B) sources of information obtained upon a promise~~
76 ~~of confidentiality; or~~

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77 ~~———— (C) any other information that, if disclosed, might~~
78 ~~result in harm, physical or otherwise, to the~~
79 ~~defendant or other persons.~~

80 ~~———— (6) Disclosure and Objections.~~

81 ~~———— (A) Not less than 35 days before the sentencing~~
82 ~~hearing — unless the defendant waives this~~
83 ~~minimum period — the probation officer must~~
84 ~~furnish the presentence report to the defendant,~~
85 ~~the defendant's counsel, and the attorney for the~~
86 ~~Government. The court may, by local rule or in~~
87 ~~individual cases, direct that the probation officer~~
88 ~~not disclose the probation officer's~~
89 ~~recommendation, if any, on the sentence.~~

90 ~~———— (B) Within 14 days after receiving the presentence~~
91 ~~report, the parties shall communicate in writing~~
92 ~~to the probation officer, and to each other, any~~

93 ~~objections to any material information,~~
94 ~~sentencing classifications, sentencing guideline~~
95 ~~ranges, and policy statements contained in or~~
96 ~~omitted from the presentence report. After~~
97 ~~receiving objections, the probation officer may~~
98 ~~meet with the defendant, the defendant's~~
99 ~~counsel and the attorney for the Government to~~
100 ~~discuss those objections. The probation officer~~
101 ~~may also conduct a further investigation and~~
102 ~~revise the presentence report as appropriate.~~

103 ~~———— (C) Not later than 7 days before the sentencing~~
104 ~~hearing, the probation officer must submit the~~
105 ~~presentence report to the court, together with an~~
106 ~~addendum setting forth any unresolved~~
107 ~~objections, the grounds for those objections, and~~
108 ~~the probation officer's comments on the~~

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109 ~~objections. At the same time, the probation~~
110 ~~officer must furnish the revisions of the~~
111 ~~presentence report and the addendum to the~~
112 ~~defendant, the defendant's counsel, and the~~
113 ~~attorney for the Government.~~

114 ~~—— (D) Except for any unresolved objection under~~
115 ~~subdivision (b)(6)(B), the court may, at the~~
116 ~~hearing, accept the presentence report as its~~
117 ~~findings of fact. For good cause shown, the~~
118 ~~court may allow a new objection to be raised at~~
119 ~~any time before imposing sentence.~~

120 **~~(e) Sentence:~~**

121 ~~—— (1) Sentencing Hearing.~~ At the sentencing hearing, the
122 ~~court must afford counsel for the defendant and for~~
123 ~~the Government an opportunity to comment on the~~
124 ~~probation officer's determinations and on other~~

125 ~~matters relating to the appropriate sentence, and~~
126 ~~must rule on any unresolved objections to the~~
127 ~~presentence report. The court may, in its discretion,~~
128 ~~permit the parties to introduce testimony or other~~
129 ~~evidence on the objections. For each matter~~
130 ~~controverted, the court must make either a finding~~
131 ~~on the allegation or a determination that no finding~~
132 ~~is necessary because the controverted matter will not~~
133 ~~be taken into account in, or will not affect,~~
134 ~~sentencing. A written record of these findings and~~
135 ~~determinations must be appended to any copy of the~~
136 ~~presentence report made available to the Bureau of~~
137 ~~Prisons.~~

138 ~~—(2) Production of Statements at Sentencing Hearing.~~
139 ~~Rule 26.2(a)-(d) and (f) applies at a sentencing~~
140 ~~hearing under this rule. If a party elects not to~~

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141 ~~comply with an order under Rule 26.2(a) to deliver~~
142 ~~a statement to the movant, the court may not~~
143 ~~consider the affidavit or testimony of the witness~~
144 ~~whose statement is withheld.~~

145 ~~— (3) **Imposition of Sentence.** Before imposing sentence,~~
146 ~~the court must:~~

147 ~~— (A) verify that the defendant and the defendant's~~
148 ~~counsel have read and discussed the presentence~~
149 ~~report made available under subdivision~~
150 ~~(b)(6)(A). If the court has received information~~
151 ~~excluded from the presentence report under~~
152 ~~subdivision (b)(5) the court — in lieu of making~~
153 ~~that information available — must summarize it~~
154 ~~in writing, if the information will be relied on in~~
155 ~~determining sentence.~~

156 ~~———— The court must also give the defendant and the~~
 157 ~~defendant's counsel a reasonable opportunity to~~
 158 ~~comment on that information;~~

159 ~~———— (B) afford defendant's counsel an opportunity to~~
 160 ~~speak on behalf of the defendant;~~

161 ~~———— (C) address the defendant personally and determine~~
 162 ~~whether the defendant wishes to make a~~
 163 ~~statement and to present any information in~~
 164 ~~mitigation of the sentence;~~

165 ~~———— (D) afford the attorney for the Government an~~
 166 ~~opportunity equivalent to that of the defendant's~~
 167 ~~counsel to speak to the court; and~~

168 ~~———— (E) if sentence is to be imposed for a crime of~~
 169 ~~violence or sexual abuse, address the victim~~
 170 ~~personally if the victim is present at the~~
 171 ~~sentencing hearing and determine if the victim~~

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172 ~~wishes to make a statement or present any~~
173 ~~information in relation to the sentence.~~

174 ~~— (4) In Camera Proceedings. The court's summary of~~
175 ~~information under subdivision (c)(3)(A) may be in~~
176 ~~camera. Upon joint motion by the defendant and by~~
177 ~~the attorney for the Government, the court may hear~~
178 ~~in camera the statements — made under subdivision~~
179 ~~(c)(3)(B), (C), (D), and (E) — by the defendant, the~~
180 ~~defendant's counsel, the victim, or the attorney for~~
181 ~~the Government.~~

182 ~~— (5) Notification of Right to Appeal. After imposing~~
183 ~~sentence in a case which has gone to trial on a plea~~
184 ~~of not guilty, the court must advise the defendant of~~
185 ~~the right to appeal. After imposing sentence in any~~
186 ~~case, the court must advise the defendant of any right~~
187 ~~to appeal the sentence, and of the right of a person~~

188 ~~who is unable to pay the cost of an appeal to apply~~
189 ~~for leave to appeal in forma pauperis. If the~~
190 ~~defendant so requests, the clerk of the court must~~
191 ~~immediately prepare and file a notice of appeal on~~
192 ~~behalf of the defendant.~~

193 **~~(d) Judgment.~~**

194 ~~— (1) In General. A judgment of conviction must set forth~~
195 ~~the plea, the verdict or findings, the adjudication, and~~
196 ~~the sentence. If the defendant is found not guilty or~~
197 ~~for any other reason is entitled to be discharged,~~
198 ~~judgment must be entered accordingly. The judgment~~
199 ~~must be signed by the judge and entered by the clerk.~~

200 ~~— (2) Criminal Forfeiture. Forfeiture procedures are~~
201 ~~governed by Rule 32.2.**~~

**The Supreme Court approved amendments in April 2000. The amendments take effect on December 1, 2000, unless Congress takes action otherwise.

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202 ~~(e) **Plea Withdrawal.** If a motion to withdraw a plea of~~
203 ~~guilty or nolo contendere is made before sentence is~~
204 ~~imposed, the court may permit the plea to be withdrawn~~
205 ~~if the defendant shows any fair and just reason. At any~~
206 ~~later time, a plea may be set aside only on direct appeal or~~
207 ~~by motion under 28 U.S.C. § 2255.~~

208 ~~(f) **Definitions.** For purposes of this rule—~~

209 ~~—(1) "victim" means any individual against whom an~~
210 ~~offense has been committed for which a sentence is~~
211 ~~to be imposed, but the right of allocution under~~
212 ~~subdivision (c)(3)(E) may be exercised instead by—~~
213 ~~——(A) a parent or legal guardian if the victim is below~~
214 ~~the age of eighteen years or incompetent; or~~
215 ~~——(B) one or more family members or relatives~~
216 ~~designated by the court if the victim is deceased~~
217 ~~or incapacitated;~~

218 ~~if such person or persons are present at the~~
219 ~~sentencing hearing, regardless of whether the~~
220 ~~victim is present; and~~

221 ~~(2) "crime of violence or sexual abuse" means a crime~~
222 ~~that involved the use or attempted or threatened use~~
223 ~~of physical force against the person or property of~~
224 ~~another, or a crime under chapter 109A of title 18,~~
225 ~~United States Code.~~

226 **Rule 32. Sentencing and Judgment**

227 **(a) Definitions.** The following definitions apply under this
228 rule:

229 **(1) "Victim" means an individual against whom the**
230 **defendant committed an offense for which the court**
231 **will impose sentence.**

232 **(2) "Crime of violence or sexual abuse" means:**

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- 233 (A) a crime that involves the use, attempted use, or
234 threatened use of physical force against
235 another's person or property; or
236 (B) a crime under 18 U.S.C. §§ 2241–2248 or
237 §§ 2251–2257.

238 **(b) Time of Sentencing.**

- 239 (1) *In General.* The court must impose sentence
240 without unnecessary delay.
241 (2) *Changing Time Limits.* The court may, for good
242 cause, change any time limits prescribed in Rule 32.

243 **(c) Presentence Investigation.**

244 **(1) *Required Investigation.***

- 245 (A) *In General.* The probation officer must conduct
246 a presentence investigation and submit a report
247 to the court before it imposes sentence unless:

248 (i) 18 U.S.C. § 3593(c) or another statute
 249 requires otherwise; or

250 (ii) the court finds that the information in the
 251 record enables it to meaningfully exercise
 252 its sentencing authority under 18 U.S.C.
 253 § 3553, and the court explains its finding on
 254 the record.

255 (B) Restitution. If the law requires restitution, the
 256 probation officer must conduct an investigation
 257 and submit a report that contains sufficient
 258 information for the court to order restitution.

259 (2) Interviewing the Defendant. The probation officer
 260 who interviews a defendant as part of a presentence
 261 investigation must, on request, give the defendant's
 262 attorney notice and a reasonable opportunity to
 263 attend the interview.

264 **(d) Presentence Report.**

265 **(1) Contents of the Report.** The presentence report
266 must contain the following information:

267 **(A) the defendant's history and characteristics,**
268 including:

269 **(i) any prior criminal record;**

270 **(ii) the defendant's financial condition; and**

271 **(iii) any circumstances affecting the defendant's**
272 behavior that may be helpful in imposing
273 sentence or in correctional treatment;

274 **(B) the kinds of sentences and the sentencing range**
275 provided by the Sentencing Commission's
276 guidelines, and the probation officer's
277 explanation of any factors that may suggest a
278 more appropriate sentence within or without an
279 applicable guideline;

- 280 (C) a reference to any pertinent Sentencing
281 Commission policy statement;
- 282 (D) verified information, stated in a
283 nonargumentative style, that assesses the
284 financial, social, psychological, and medical
285 impact on any individual against whom the
286 offense has been committed;
- 287 (E) when appropriate, the nature and extent of
288 nonprison programs and resources available to
289 the defendant;
- 290 (F) when the law permits the court to order
291 restitution, information sufficient for such an
292 order;
- 293 (G) if the court orders a study under 18 U.S.C.
294 § 3552(b), any resulting report and
295 recommendation; and

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296 (H) any other information that the court requires.

297 (2) **Exclusions.** The presentence report must exclude
298 the following:

299 (A) any diagnoses that, if disclosed, might seriously
300 disrupt a rehabilitation program;

301 (B) any sources of information obtained upon a
302 promise of confidentiality; and

303 (C) any other information that, if disclosed, might
304 result in physical or other harm to the defendant
305 or others.

306 (e) **Disclosing the Report and Recommendation.**

307 (1) **Time to Disclose.** Unless the defendant has
308 consented in writing, the probation officer must not
309 submit a presentence report to the court or disclose
310 its contents to anyone until the defendant has

311 pleaded guilty or nolo contendere, or has been found
 312 guilty.

313 **(2) Minimum Required Notice.** The probation officer
 314 must give the presentence report to the defendant,
 315 the defendant's attorney, and the attorney for the
 316 government at least 35 days before sentencing unless
 317 the defendant waives this minimum period.

318 **(3) Sentence Recommendation.** By local rule or by
 319 order in a case, the court may direct the probation
 320 officer not to disclose to anyone other than the court
 321 the officer's recommendation on the sentence.

322 **(f) Objecting to the Report.**

323 **(1) Time to Object.** Within 14 days after receiving the
 324 presentence report, the parties must state in writing
 325 any objections, including objections to material

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326 information, sentencing guideline ranges, and policy
327 statements contained in or omitted from the report.

328 **(2) *Serving Objections.*** An objecting party must
329 provide a copy of its objections to every other party
330 and to the probation officer.

331 **(3) *Action on Objections.*** After receiving objections,
332 the probation officer may meet with the parties to
333 discuss the objections. The probation officer may
334 then investigate further and revise the presentence
335 report as appropriate.

336 **(g) *Submitting the Report.*** At least 7 days before
337 sentencing, the probation officer must submit to the court
338 and to the parties the presentence report and an
339 addendum containing any unresolved objections, the
340 grounds for those objections, and the probation officer's
341 comments on them.

342 **(h) Sentencing.**

343 **(1) *In General.* At sentencing, the court:**

344 **(A) must verify that the defendant and the**
 345 **defendant's attorney have read and discussed**
 346 **the presentence report and any addendum to the**
 347 **report;**

348 **(B) must give the defendant and the defendant's**
 349 **attorney a written summary of — or summarize**
 350 **in camera — any information excluded from the**
 351 **presentence report under Rule 32(d)(2) on**
 352 **which the court will rely in sentencing, and give**
 353 **them a reasonable opportunity to comment on**
 354 **that information;**

355 **(C) must allow the parties' attorneys to comment on**
 356 **the probation officer's determinations and other**
 357 **matters relating to an appropriate sentence; and**

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358 (D) may, for good cause, allow a party to make a
359 new objection at any time before sentence is
360 imposed.

361 (2) ***Introducing Evidence; Producing Statements.*** The
362 court may permit the parties to introduce evidence
363 on the objections. If a witness testifies at sentencing,
364 Rule 26.2(a)-(d) and (f) applies. If a party does not
365 comply with a Rule 26.2(a) order to produce a
366 witness's statement, the court must not consider that
367 witness's testimony.

368 (3) ***Court Determinations.*** At sentencing, the court:
369 (A) may accept any undisputed portion of the
370 presentence report as a finding of fact;
371 (B) must rule on any —
372 (i) unresolved objection to a material matter in
373 the presentence report; and

374 (ii) other controverted matter, unless the court
375 determines that a ruling is unnecessary
376 either because the matter will not affect
377 sentencing, or because the court will not
378 consider the matter in sentencing; and
379 (C) must append a copy of the court's
380 determinations under this rule to any copy of the
381 presentence report made available to the Bureau
382 of Prisons.

383 **(4) Opportunity to Speak.**

384 (A) By a Party. Before imposing sentence, the court
385 must:
386 (i) provide the defendant's attorney an
387 opportunity to speak on the defendant's
388 behalf;

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- 389 (ii) address the defendant personally in order to
390 permit the defendant to speak or present
391 any information to mitigate the sentence;
392 and
393 (iii) provide an attorney for the government an
394 opportunity to speak equivalent to that of
395 the defendant's attorney.
- 396 (B) *By a Victim.* Before imposing sentence, the
397 court must address any victim of a crime of
398 violence or sexual abuse who is present at
399 sentencing and permit the victim to speak or
400 submit any information concerning the sentence.
401 Whether or not the victim is present, a victim's
402 right to address the court may be exercised by
403 the following persons if present:

- 404 (i) a parent or legal guardian, if the victim is
 405 younger than 18 years or is incompetent; or
 406 (ii) one or more family members or relatives
 407 the court designates, if the victim is
 408 deceased or incapacitated.

409 (C) In Camera Proceedings. Upon a party's motion
 410 the court may hear in camera any statement
 411 made under Rule 32(h)(4).

412 (5) **Notice of Possible Departure from Sentencing**
 413 **Guidelines.** Before the court may depart from the
 414 Guidelines calculation on a ground not identified as
 415 a ground for departure either in the presentence
 416 report or in a prehearing submission by a party, the
 417 court must give the parties reasonable notice that it
 418 is contemplating such a departure. The notice must

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419 specifically identify the ground on which the court is
420 contemplating a departure.

421 **(i) Defendant's Right to Appeal.**

422 **(1) Advice of a Right to Appeal.**

423 (A) *Appealing a Conviction.* If the defendant
424 pleaded not guilty and was convicted, after
425 sentencing the court must advise the defendant
426 of the right to appeal the conviction.

427 (B) *Appealing a Sentence.* After sentencing —
428 regardless of the defendant's plea — the court
429 must advise the defendant of any right to appeal
430 the sentence.

431 (C) *Appeal Costs.* The court must advise a
432 defendant who is unable to pay appeal costs of
433 the right to ask for permission to appeal in
434 forma pauperis.

435 **(2) *Clerk's Filing of Notice.*** If the defendant so
 436 requests, the clerk must immediately prepare and file
 437 a notice of appeal on the defendant's behalf.

438 **(j) *Judgment.***

439 **(1) *In General.*** In the judgment of conviction, the court
 440 must set forth the plea, the jury verdict or the court's
 441 findings, the adjudication, and the sentence. If the
 442 defendant is found not guilty or is otherwise entitled
 443 to be discharged, the court must so enter judgment.
 444 The judge must sign the judgment, and the clerk
 445 must enter it.

446 **(2) *Criminal Forfeiture.*** Forfeiture procedures are
 447 governed by Rule 32.2.

COMMITTEE NOTE

The language of Rule 32 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood

and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The rule has been completely reorganized to make it easier to follow and apply. For example, the definitions in the rule have been moved to the first sections and the sequencing of the sections generally follows the procedure for presentencing and sentencing procedures.

Under current Rule 32(c)(1), the court is required to "rule on any unresolved objections in the presentence report." The rule does not specify, however, whether that provision should be read literally to mean every objection that might have been made to the report or only on those objections which might in some way actually affect the sentence. Revised Rule 32(h)(3)(B)(i) now explicitly requires that the court must rule on any "unresolved objection to a material matter" in the presentence report, whether or not the court will consider it in imposing an appropriate sentence. This is a change from the current rule. If, on the other hand, the unresolved objection addresses any other controverted matter, the court must either make a finding on the objection or decide that a finding is not required because the matter will not affect sentencing or that the matter will not be considered at all in sentencing. *See* Rule 32(h)(3)(B)(ii). The new language recognizes that even if an unresolved objection may not have any impact on determining a sentence under the Sentencing Guidelines, it often affects other important post-sentencing decisions. For example, the Bureau of Prisons consults the presentence report in deciding, where a defendant will actually serve his or her sentence of confinement. *See A Judicial Guide to the Federal Bureau of Prisons*, 11 (United States Department of Justice, Federal Bureau of Prisons 1995) (noting that "Bureau relies primarily on the Presentence

Investigator Report..."). *See also* 18 U.S.C. § 3621 (Bureau of Prisons decides where prisoner will serve sentence); *United States v. Velasquez*, 748 F.2d 972, 974 (5th Cir. 1984) (rule designed to protect against evil that false allegation that defendant was notorious alien smuggler would affect defendant for years to come); *United States v. Brown*, 715 F.2d 387, 389 n.2 (5th Cir. 1983) (sentencing report affects "place of incarceration, chances for parole, and relationships with social service and correctional agencies after release from prison"). Thus, the Committee considers a "material" matter to be one that will likely affect the defendant's subsequent treatment, including decisions made by the Bureau of Prisons. To that end, counsel should be prepared to point out to the court those matters that are typically considered by the Bureau of Prisons in designating the place of confinement. For example, the Bureau considers:

the type of offense, the length of sentence, the defendant's age, the defendant's release residence, the need for medical or other special treatment, and any placement recommendation made by the court.

A Judicial Guide to the Federal Bureau of Prisons, supra, at 11. Thus, even assuming that an unresolved objection to the report's discussion about the need for medical treatment might not affect the sentence, it would be considered under the revised rule to be a material matter and one to be resolved by the court. Further, a question as to whether or not the defendant has a "drug problem" could have an impact on whether the defendant would be eligible for prison drug abuse treatment programs. 18 U.S.C. § 3621(e) (Substance abuse treatment). Accordingly, the Committee would view that as a material matter to be resolved by the court.

Revised Rule 32(h)(4)(B) provides for the right of certain victims to address the court during sentencing. Revised Rule 32(a)(2) expands the definition of victims in Rule 32(a)(2) to include victims of crimes under 18 U.S.C. §§ 2251-57 (child pornography and related offenses). Thus, they too will now be permitted to address the court.

Rule 32(h)(4)(C) includes a change concerning who may request an in camera proceeding. Under current Rule 32(c)(4), the parties must file a joint motion for an in camera proceeding to hear the statements by the defense counsel, the defendant, the attorney for the government, or any victim. Under the revised rule, any party may move that the court hear in camera any statement — by a party or a victim—made under revised Rule 32(h)(4).

Rule 32(h)(5) is a new provision that reflects *Burns v. United States*, 501 U.S. 129, 138-139 (1991). In *Burns*, the Court held that before a sentencing court could depart upward on a ground in the Sentencing Guidelines, not previously identified in the presentence report as a ground for such departure, Rule 32 requires the court to give the parties reasonable notice that it is contemplating such a ruling and to identify the specific ground for the departure. The Court also indicated that because the procedural entitlements in Rule 32 apply equally to both parties, it was appropriate to address the issue of requiring notice whether the sentencing court departs either upward or downward. *Id.* at 135, n.4.

Finally, current Rule 32(e), which addresses the ability of a defendant to withdraw a guilty plea, has been moved to Rule 11(e).

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 32 is one of those rules. This version of Rule 32 includes an amendment that expands the occasions that the sentencing judge would have to rule on unresolved objections to the presentence report. This version requires the judge to rule on every unresolved "material" matter in the report. Another version of Rule 32, that does not include this provision, is being published simultaneously in a separate pamphlet.

- 1 **~~Rule 35. Correction or Reduction of Sentence~~**
- 2 **~~(a) Correction of a Sentence on Remand.~~** The court shall
- 3 ~~correct a sentence that is determined on appeal under 18~~
- 4 ~~U.S.C. 3742 to have been imposed in violation of law, to~~
- 5 ~~have been imposed as a result of an incorrect application~~
- 6 ~~of the sentencing guidelines, or to be unreasonable, upon~~
- 7 ~~remand of the case to the court—~~

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8 ~~— (1) for imposition of a sentence in accord with the~~
9 ~~findings of the court of appeals; or~~

10 ~~— (2) for further sentencing proceedings if, after such~~
11 ~~proceedings, the court determines that the original~~
12 ~~sentence was incorrect.~~

13 **~~(b) Reduction of Sentence for Substantial Assistance.~~** ~~If~~
14 ~~the Government so moves within one year after the~~
15 ~~sentence is imposed, the court may reduce a sentence to~~
16 ~~reflect a defendant's subsequent substantial assistance in~~
17 ~~investigating or prosecuting another person, in~~
18 ~~accordance with the guidelines and policy statements~~
19 ~~issued by the Sentencing Commission under 28 U.S.C.~~
20 ~~§ 994. The court may consider a government motion to~~
21 ~~reduce a sentence made one year or more after the~~
22 ~~sentence is imposed if the defendant's substantial~~
23 ~~assistance involves information or evidence not known by~~

24 ~~the defendant until one year or more after sentence is~~
25 ~~imposed. In evaluating whether substantial assistance has~~
26 ~~been rendered, the court may consider the defendant's~~
27 ~~pre-sentence assistance. In applying this subdivision, the~~
28 ~~court may reduce the sentence to a level below that~~
29 ~~established by statute as a minimum sentence.~~

30 ~~(c) **Correction of Sentence by Sentencing Court.** The~~
31 ~~court, acting within 7 days after the imposition of~~
32 ~~sentence, may correct a sentence that was imposed as a~~
33 ~~result of arithmetical, technical, or other clear error.~~

34 **Rule 35. Correcting or Reducing a Sentence**

35 **(a) Correcting Clear Error.** Within 7 days after sentencing,
36 the court may correct a sentence that resulted from
37 arithmetical, technical, or other clear error.

38 **(b) Reducing a Sentence for Substantial Assistance.**

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39 (1) **In General.** Upon the government's motion made
40 within one year of sentencing, the court may reduce
41 a sentence if:

42 (A) the defendant, after sentencing, provided
43 substantial assistance in investigating or
44 prosecuting another person; and

45 (B) reducing the sentence accords with the
46 Sentencing Commission's guidelines and policy
47 statements.

48 (2) **Later Motion.** The court may consider a government
49 motion to reduce a sentence made one year or more
50 after sentencing if the defendant's substantial
51 assistance involved information not known — or the
52 usefulness of which could not reasonably have been
53 anticipated — until more than one year after
54 sentencing.

- 55 **(3) *Evaluating Substantial Assistance.*** In evaluating
56 whether the defendant has provided substantial
57 assistance, the court may consider the defendant's
58 presentence assistance.
- 59 **(4) *Below Statutory Minimum.*** When acting under
60 Rule 35(b), the court may reduce the sentence to a
61 level below the minimum sentence established by
62 statute.

COMMITTEE NOTE

The language of Rule 35 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The Committee deleted current Rule 35(a) (Correction on Remand). That rule, which currently addresses the issue of the district court's actions following a remand on the issue of sentencing, was added by Congress in 1984. P.L. 98-473. The rule cross-references 18 U.S.C. § 3742, also enacted in 1984, which provides detailed guidance on the various options available to the appellate courts in addressing sentencing errors. In reviewing both provisions, the Committee concluded that Rule 35(a) was no longer needed. First,

the statute clearly covers the subject matter and second, it is not necessary to address an issue that would be very clear to a district court following a decision by a court of appeals. The remaining subdivisions have been re-numbered.

Former Rule 35(c), which addressed the authority of the court to correct certain errors in the sentence, is now located in Rule 35(a).

A substantive change has been made in Rule 35(b). Under the current rule, if the government believes that a sentenced defendant has provided substantial assistance in investigating or prosecuting another person, it may move the court to reduce the original sentence; ordinarily, the motion must be filed within one year of sentencing. In 1991, the rule was amended to permit the government to file such motions after more than one year had elapsed if the government could show that the defendant's substantial assistance involved "information or evidence not known by the defendant" until more than one year had elapsed. The current rule, however, did not address the question of whether a motion to reduce a sentence could be filed and granted in those instances when the defendant's substantial assistance involved information *known* to the defendant within one year after sentencing, but no motion was filed because the significance or usefulness of the information was not apparent until after the one-year period had elapsed. The courts were split on the issue. *Compare United States v. Morales*, 52 F.3d 7 (1st Cir. 1995) (permitting filing and granting of motion) with *United States v. Orozco*, 160 F.3d 1309 (11th Cir. 1998) (denying relief and citing cases). Although the court in *Orozco* felt constrained to deny relief under Rule 35(b), the court urged an amendment of the rule to:

address the apparent unforeseen situation presented in this case where a convicted defendant provides information to the government prior to the expiration of the jurisdictional, one-year period from sentence imposition, but that information does not become useful to the government until more than one year after sentence imposition. *Id.* at 1316, n. 13.

The Committee has amended the rule to make clear that a sentence reduction motion is permitted in those instances identified by the court in *Orozco*. The rule's one-year restriction generally serves the important interests of finality and of creating an incentive for defendants to provide promptly what useful information they might have. Thus, the proposed amendment would not eliminate the one-year requirement as a generally operative element. But where the usefulness of the information is not reasonably apparent until a year or more after sentencing, no sound purpose is served by the current rule's removal of any incentive to provide that information to the government one year or more after the sentence (or if previously provided, for the government to seek to reward the defendant) when its relevance and substantiality become evident.

REPORTER'S NOTES

In publishing the "style" changes to the Federal Rules of Criminal Procedure, the Committee decided to publish separately any rule that includes what it considered at least one major substantive change. The purpose for this separate publication is to highlight for the bench and the bar any proposed amendments that the Committee believes will result in significant changes in current practice. Rule 35 is one of those rules. This proposed revision of Rule 35 includes an amendment that would authorize a court to hear a motion to reduce a sentence,